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Robert K. Corbin

April 17, 1979

Sonny Najera
Assistant Director, Aeronautics Division
205 South 17th Avenue
Phoenix, Arizona 85007

Re: I79-106 (R78-312)

Dear Mr. Najera:

This is in response to your letter of October 26, 1978 in which you asked the following questions:

1. May the Transportation Board distribute monies to municipalities and counties pursuant to the authority of A.R.S. Section 28-106, subsection A, where the municipality or county involved owns less than a fee simple interest in the lands upon which the airport improvement is contemplated and, if so, what is the minimal interest required?

2. May the Transportation Board under the authority of this same statutory provision, distribute such monies to an otherwise qualified governmental entity for planning or land acquisition purposes in connection with a proposed airport site, where at the time of the distribution, the qualified governmental entity had not yet acquired any property interest in such site?

3. May the Transportation Board distribute monies under the authority of this same statute for the improvement of an airport owned by an otherwise qualified governmental entity, when such entity has entered into a long-term lease arrangement with a private corporation, the terms of which preclude the public from utilizing any of the airport facilities?

A.R.S. Section 28-106(A) provides in part, as follows:

> "With respect to aeronautics, the transportation board shall:
>
> 1. Distribute monies appropriated to the division from the state aviation fund for planning, design, development, acquisition of interests in land, construction and improvement of publicly owned and operated airport facilities in counties and incorporated cities and towns. ..."

In order to answer your first question with regard to whether monies can be distributed to municipalities and counties which own less than a fee simple interest in the airport property, it is obviously necessary to determine what is meant by the statutory requirements that the airport be "publicly owned". The statutes are of limited assistance in this regard. No definition of "owned" is contained in A.R.S. Section 28-106 itself, nor is one to be found in the definitions given for use with Title 28 (A.R.S. Section 28-101), nor even the general definition section governing all statutes and laws of the State (A.R.S. Section 1-215). Consequently, we must look to other sources.

A.R.S. Section 28-101(30) defines the term "owner" as meaning

> "... a person who holds the legal title of a vehicle or, if a vehicle is the subject of an agreement for the conditional sale or lease with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, the conditional vendee or lessee, or, if a mortgagor of a vehicle is entitled to possession, the mortgagor."

The Arizona Supreme Court in Pinkerton v. Pritchard, 71 Ariz. 117, 223 P.2d 933 (1950) has observed that the term "owner" has no set meaning, stating, 71 Ariz. at 123:

> "...Ownership has been held by this court in City of Phoenix v. State ex rel. Harless, 60 Ariz. 369, 137 P.2d 783, 786, 146 A.L.R. 1255, [(1943)] as covering different estates in real property. The court there said: 'The word "owner" has no technical meaning but its definition will contract or expand according to the subject matter to which it is applied. As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. It has led some courts to declare that the word has no precise legal signification and may be applied to any defined interest in real estate. Merrill Ry. & Lighting Co. v. City of Merrill, 119 Wis. 249, 96 N.W. 686.' ..."

Consistent with this varied nature of the term "own", the courts of this and other states have concluded that under the particular circumstances of the case under review, ownership may consist of something less than an estate in fee. For example, it has been held to include an equitable interest, Benner-Williams, Inc. v. W. F. Romine, 200 Kan. 483, 437 P.2d 312 (1968); a contract-vendor's interest, City of Phoenix v. State, 60 Ariz. 369, 137 P.2d 783 (1943); an easement, Application of County Collector, 44 Ill. App. 3d 327, 357 N.E.2d 1302 (1976); or a leasehold interest, Buehner Block Co. v. Glezos, 6 Utah 2d 226, 310 P.2d 517 (1957); Bowen v. Metropolitan Board of Zoning Appeals in Marion County, 161 Ind. App. 522, 317 N.E.2d 193 (1974). Unfortunately, none of these cases involve interpretation of a statute such as the one we are dealing with, although they do illustrate the flexible nature of the term "own".

More to the point is the construction given to a somewhat similar federal provision in the rules of the Federal Aviation Administration. The Airport and Airway Development Act of 1970, 49 U.S.C. Section 1711-1727, as amended, provides that the Secretary of the Department of Transportation may make grants for the development of "public airports". See U.S.C. Section 1714. The term "public airport" is defined in 49 U.S.C. Section 1711 (12) as follows:

> "'Public Airport' means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned." (Emphasis added.)

In the regulations promulgated pursuant to this legislation, codified as 14 C.F.R. Part 152 (1978), provision is made for what property interest an applicant must have or agree to obtain in order to receive a grant. In some instances, the regulations permit less than a fee ownership. Subpart B of 14 C.F.R. Part 152 deals with rules and procedures for airport development projects. Section 152.29(c) defines the term "property interest" as including lands to be developed or used as part of or in connection with the airport as it will exist when completed, which lands are covered by, inter alia, a lease with a minimum term of 20 years where title is held by another public agency or the United States or, as to offsite areas, an agreement, easement, "... leasehold or other right or property interest..." that, in the Federal Aviation Administration's opinion, contains reasonable assurances that the land will be available for the intended purposes.

Based on the foregoing, it is apparent that an airport may be "publicly owned" even if the public body's interest is something less than a fee simple. However, we cannot answer the second part of your first question concerning the minimal interest required. Drawing such fine lines is not within the scope or role of this office, but rather is an administrative or legislative function. While the Director of the Department of Transportation is given the authority to promulgate rules and regulations with regard to aeronautics (A.R.S. Section 28-1722(E), since the legislative intent is not clear from the statutes, we believe it would be preferable to request clarification in this regard from the Legislature.

In answer to your second question, we believe it is obvious that a governmental entity cannot be expected to develop an airport without first engaging in planning and acquiring the land. Indeed, this conclusion is fortified by the fact that the Legislature specifically amended A.R.S. Section 28-106(A)(1) in 1977 (See Laws 1977, Ch. 63, Sec. 1) to add the words "...planning, design, development, acquisition of interests in land..." to the statute. Requiring an applicant to already have a publicly owned and operated airport before it could receive funds to plan and acquire land for such an airport would be inconsistent with the apparent legislative intent in amending the statute and could produce an absurdity. The Arizona Supreme Court has consistently stated that it is its duty to avoid absurd results and construe a statute so that it is a workable law. City of Phoenix v. Superior Court, 101 Ariz. 265, 419 P.2d 49 (1966). Therefore, it is our opinion that money may be distributed to a qualified governmental entity for planning and land acquisition when the proposed airport, when operational, will be publicly owned and operated.

In answer to your final question, when an airport has been leased to a private corporation and the public is precluded from using the airport, the requirement of A.R.S. Section 28-106(A)(1) that the airport be publicly operated is not met, since the airport is not operated by a public body nor is it operated for the benefit of the general public. Consequently, money may not be distributed from the state aviation fund for the improvement of such an airport.

Finally, we find nothing in the recent decision in Kunes v. Samaritan Health Service, ___ Ariz. ___ (Ariz. Supreme Court No. 13580, January 23, 1979) which would compel a result other than that reached in this opinion. That case held that charitable hospitals that leased equipment from non-tax-exempt

financial institutions were not entitled to a tax exemption because the items were not owned by the hospitals. The decision does not affect the present opinion because the "ownership" issue therein involved a strict and narrow construction of a tax exemption, the rule being that a presumption exists that such exemptions are not favored. Louis Frunow Memorial Clinic v. Oglesby, 42 Ariz. 98, 22 P.2d 1076 (1933).

The 1977 Amendments to A.R.S. Section 28-106(A)(1), discussed above, include authorization to acquire "...interests in land ...," the clear import being that interests other than complete, fee simple title are contemplated by the Legislature. Had a different result been intended, the Legislature would not have used the modifying words "interests in" prior to the term "land."

Very truly yours,

Bob Corbin

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